No. 04-163

Supreme Court, U.S.
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In The
Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, and MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

As the petition for *certiorari* showed, the Ninth Circuit has erroneously taken language in this Court's decision in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), as a broad warrant to engage in the second-guessing of the wisdom and efficacy of state economic regulation under the Just Compensation Clause. Other appellate courts have properly recognized that this Court intended no such revival of the *Lochner* era, and that the Just Compensation Clause does not authorize heightened scrutiny of the validity of economic regulation. Chevron predictably seeks to minimize the significance of the issues raised by the decision below and to deny the confusion in the lower courts surrounding these questions, but it cannot hide the critical importance of these issues or the need for this Court's review. The *amicus* briefs filed by 22 Attorneys General, the National Conference of State Legislatures, five associations of municipal governments, and the League of California Cities confirm the serious threat posed to democratic governance and to federalism by the Ninth Circuit's unprecedented and profoundly misguided decision.

Chevron does not dispute that this case is an appropriate vehicle for the Court to resolve the questions surrounding the ostensible "substantially advance" test, as it presents none of the obstacles that prevented the Court from doing so in prior cases. Moreover, while Chevron raises factual arguments concerning the efficacy of Act 257, it also does not dispute that the Act would easily survive the deferential review traditionally applied to social and economic legislation under the Due Process

Clause.[1] Both issues presented by this petition are thus outcome determinative in this case.

The urgent need to resolve these issues is confirmed by a very recent Ninth Circuit decision striking down yet another rent control ordinance under the "substantially advance" takings test, prompting Judge Fletcher to decry that court's "return to judicial activism": "We learned in

[1] Chevron does attempt to sow confusion about the efficacy of Act 257 by arguing, as it argued below, that the Act would not have the effect of immediately lowering retail gasoline prices in Hawaii. Opp. 5-7. But as the State explained in the *certiorari* petition, it has never been the State's position that the Act was enacted for that purpose. Rather, Act 257 was designed to protect consumers by *preserving* the structure of the retail market for gasoline in Hawaii, which is currently relatively unconcentrated in a manner beneficial to consumers. Although Chevron argues that Act 257 may have some unquantified adverse impact on retail gasoline prices, it does not dispute that the statute was intended to protect consumers from the risk of *future* price increases if independent retailers were squeezed out of business, Opp.7 n.2, nor does it dispute that the Act will prevent that outcome – as the trial court expressly found. App. 48. There is also no evidence, and the district court made no findings, that any incidental effects on *current* gasoline prices caused by the Act would outweigh the potentially severe harm to consumers that, in the judgment of the State legislature, would likely occur if the retail market for gasoline were concentrated in the hands of a few large oil companies.

In further efforts to confuse, Chevron misleadingly states that Act 257 limits its collection of "motor fuel facilities rent" at each of its stations, Opp. 4, implying that it has suffered economic loss at each station. In fact, "motor fuel facilities rent" is only one component of the overall rent allowed under Act 257. App. 37, 122. Chevron stipulated that it can receive more rent under Act 257 than it would have charged at virtually all of its stations (and can receive more rent in aggregate from its stations as a whole). ER 56-57, 66-68. Chevron also asserts that Act 257 "freezes" rents at a level below that necessary for Chevron to recoup its expenses, Opp. 4, but fails to disclose that it customarily sets its rents for leased stations below its expenses, relying on its profits from the sale of gasoline to the dealers. App. 38-39. Chevron stipulated that it will receive a return on its stations under Act 257 "that satisfies any Constitutional standards." ER 60. By itself, that stipulation should be conclusive of Chevron's taking challenge.

the 1930s that economic regulation is generally done better by politically accountable legislators than by life-tenured judges. I regret to say that the Ninth Circuit is unlearning that painfully learned lesson." *Cashman v. City of Cotati*, 374 F.3d 887, 905 (9th Cir. 2004) (W. Fletcher, J., dissenting). Absent direction from this Court, the Ninth Circuit will plainly continue its *de novo* review of the policy wisdom of social and economic legislation under the Just Compensation Clause.[2]

I. THE APPLICABILITY OF THE "SUBSTANTIALLY ADVANCE" TEST FOR ESTABLISHING A TAKING WARRANTS THIS COURT'S REVIEW

Chevron's contention that opinions of this Court reflect "no uncertainty" regarding the validity of the substantially advance test is breathtakingly inaccurate. Both *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), plainly recognize that the validity of the substantially advance test, as an ostensible general test for a taking,[3] is open to serious doubt. In

[2] Contrary to Chevron's statement that this is a fact-specific case, and its suggestion that the substantially advance test will be applied only "rarely," the Ninth Circuit's recent decision in *Cotati* bears out Judge Fletcher's warning that "virtually all rent control laws in the Ninth Circuit" may now be unconstitutional under this standard. App. 29.

[3] Contrary to Chevron's suggestion, Opp. 15, the State does not question the decisions in either *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) or *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Those decisions merely recognize that an exaction may constitute a taking if it is demanded as a condition for regulatory approval of development rather than imposed outright, and use means-ends scrutiny to ensure that planning authorities do not, in effect, indirectly impose takings through such conditions. No such concern is presented in this case, or in the vast majority of other cases involving regulatory takings challenges to economic regulations.

Eastern Enterprises, five Justices rejected the premise of this purported test, namely, that inquiry into the legitimacy of governmental action properly lies under the Just Compensation Clause. Although the lack of a specific property interest formed one basis for Justice Kennedy's conclusion that the Just Compensation Clause was inapplicable in *Eastern Enterprises,* Justice Kennedy *also* rested his conclusion on the fact that "the constitutionality of the [statute] appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation." 524 U.S. at 545. Justice Breyer's dissent agreed that the Just Compensation Clause is not concerned with "preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* at 554.

In *Del Monte Dunes*, the Court explicitly said that it had never explained "the nature *or applicability*" of the "substantially advance" test outside the context of exactions. 526 U.S. at 704 (emphasis added). Chevron's contention that Justices Scalia and Souter's statements in *Del Monte Dunes* reserving the validity of the "substantially advance" test, *id.* at 732 n.2, 753 n.12, signified nothing at all borders on the ridiculous. Those Justices' statements plainly were meant to dispel any inference that the Court's affirmance of the lower court's judgment, having been based in part on the city's waiver of its objections to this test, should be read as endorsing this test.[4]

[4] Contrary to Chevron's assertion, the Court's subsequent reference to the substantially advance test in *dictum* in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333-34 (2002), cannot be read as resolving the uncertainty about this test. The Court merely identified that test as one of several "arguable" theories that might have been advanced, but quickly concluded that it was foreclosed by the facts. At most, *Tahoe-Sierra*

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To convert the "substantially advance" test into a warrant for broad judicial inquiry into the wisdom or effectiveness of governmental action would be inconsistent with this Court's long-settled understanding of the purpose of the Just Compensation Clause. As the Court emphasized in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987), the Just Compensation Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." Chevron's assertion that the Clause can equally well be used to *enjoin* improper governmental action stands this "basic understanding" on its head.[5]

Chevron also fails in its attempt to obscure the conflicts that abound in the lower courts. The square rejection of a "substantially advance" takings claim in *Brunelle v. Town of South Kingstown,* 700 A.2d 1075, 1083 n.5 (R.I. 1997), for example, cannot be ignored on the basis that it involved a zoning issue; nothing in that decision suggests that the court would have reached a different conclusion for rent control.[6] Nor does Chevron deal convincingly with

indicates that the Court considers the validity of this ostensible takings test unresolved. Chevron's argument illustrates a larger point, however: this Court's repeated citation to the *Agins* test, combined with its evident doubts concerning its validity, creates confusion that only the Court can resolve.

[5] Chevron errs in suggesting that an injunction was appropriate in this case under a "monetary takings" exception to the general rule that the remedy for a taking is compensation. Opp. 20-21. If that exception exists, a question not definitively resolved by *Eastern Enterprises*, it has no application here. Act 257 does not require Chevron to pay out money, but rather regulates the price at which it leases its property.

[6] *Woodland Manor III Assocs. v. Keeney*, 713 A.2d 806, 811 (R.I. 1998), does not contradict *Brunelle*, since the court cited *Agins* in that case only for the proposition that a regulation that denies economically viable use of property constitutes a taking.

Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So.2d 54 (Fla. 1994), and *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001). Both cases involved claims that an invalid law can be held to effect a taking solely because it does not substantially advance a legitimate state interest. The Florida and New Jersey Supreme Courts both rejected that proposition, making clear that a regulatory taking claim must be based on a showing of economic injury. These decisions therefore conflict with the Ninth Circuit's decision.

Contrary to Chevron's reading of *Simi Investment Co. v. Harris County*, 256 F.3d 323 (5th Cir. 2001), that decision holds that claims of "illegitimate and arbitrary governmental abuse" should be brought under the Due Process Clause, rather than the Just Compensation Clause. This is confirmed by the court's recognition, in its initial opinion in that case, that the plaintiff's allegation that the county interfered with its property rights for no legitimate public purpose did not support a taking claim. 236 F.3d at 248 and n.12. Similarly, Chevron's bewilderment at the Eleventh Circuit's statement in *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1211 n.1 (11th Cir. 1995), that that court does not "recognize [failure to substantially advance claims] as distinct, viable federal constitutional claims in the zoning context" does nothing to dispel that court's holding. The Eleventh Circuit has in fact evolved a distinctive typology for claims challenging land use regulations, *see Eide v. Sarasota County*, 908 F.2d 716, 720-22 (11th Cir. 1990), that does not include "substantially advance" claims.[7]

[7] *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996), cited by Chevron, actually underscores the confusion surrounding the "substantially advance" test. In that case, the Eleventh Circuit stated that the challenged law satisfied the purported "substantially advance" test for a taking under *Agins* – but rested that conclusion on a prior

(Continued on following page)

Finally, Chevron is unable to explain away the Federal Circuit's settled rule that a plaintiff cannot establish a taking by challenging the underlying legitimacy or wisdom of the government's action. *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001), cited *Agins* only in assessing the character of the governmental action under the three-part *Penn Central* test, and rejected the claim that government's action may be assailed as a taking because it is illegitimate. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), similarly cited *Agins* only in passing and in another context, and squarely rejected any assertion of a takings claim based on the legitimacy or efficacy of government action, reversing the trial court for attempting to assess whether the government's regulation in fact protected water quality. *Id.* at 898-99. Both cases are thus squarely inconsistent with the decision in this case.

II. THE STANDARD OF REVIEW FOR ESTABLISHING A TAKING IS ALSO AN IMPORTANT ISSUE ON WHICH THERE IS CONFLICT IN THE LOWER COURTS

Chevron also misses the mark in disputing that the intrusive standard of review applied by the Ninth Circuit in this case raises an issue warranting this Court's review. Chevron seeks to obscure the extraordinarily intrusive standard of review applied by the Ninth Circuit, denying that it represents *de novo* review, and characterizing it instead as an "intermediate" level of review. Opp. 21. But

decision that had rejected a challenge to the law under *substantive due process*. *Id.* at 1072, *citing Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993). At most, therefore, the Eleventh Circuit views the "substantially advance" test as indistinguishable from the traditionally deferential inquiry under the Due Process Clause.

the Ninth Circuit clearly conducted an independent assessment of the utility of Act 257: the court directed the trial court to conduct a judicial inquiry into the efficacy of Act 257, to be decided as a *factual matter by a preponderance of the evidence at trial* without any deference to legislative judgment.

Chevron's characterization of this standard as "intermediate" does not alter its *de novo* character, and cannot mask its intrusiveness. Whether or not the Ninth Circuit's standard is less stringent than the so-called "rough proportionality" test, under which the burden shifts to government to defend the constitutionality of exactions, it is a standard that has not been applied to social and economic *legislation* since the discredited era of *Lochner v. New York*, 198 U.S. 45 (1905).[8] The effect of this expansion in judicial review in the Ninth Circuit will be profound: the traditional "rational basis" test for social and economic legislation challenged under Due Process and Equal Protection will be completely supplanted by *de novo* takings challenges testing the effectiveness of legislation as a matter of "predictive fact."

Chevron provides no justification for such a radical departure from established constitutional principles. The *Agins* Court's use of the word "substantially" does not support heightened scrutiny; the "substantially advance" formulation was derived from Due Process cases that employed highly deferential review. Pet. 23-24. Chevron offers no explanation for why a test concededly drawn from Due Process should be applied using a standard entirely inconsistent with the standard under that provision. Nor do this Court's decisions lend any support to

[8] This Court concluded in *Dolan* that the heightened review established for exactions applies only to *adjudicative* decisions, not to legislation. 512 U.S. at 391 n.8.

such an intrusive standard of review. Although this Court has recognized the propriety of means-ends scrutiny in the special context of exactions (*see* note 2, *supra*), it has made clear that the standards articulated in those cases do not apply generally to takings claims. *Del Monte Dunes*, 526 U.S. at 703. On the other hand, this Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), addressing a challenge to general legislation under the Just Compensation Clause, unanimously rejected inquiry into the effectiveness of the legislation, and strongly implied that deferential review is appropriate.[9]

Finally, Chevron fails to explain away lower court decisions that conflict with the Ninth Circuit's approach. In *South County Sand & Gravel Co. v. Town of South Kingstown*, 160 F.3d 834 (1st Cir. 1998), the court termed the difference between the "substantial relation" and "rational basis" standards "semantics," and stated that the substantive due process analysis it employed in a prior case "is fully consonant" with takings analysis. *Id.* at 836. Most importantly, the First Circuit squarely rejected review of the efficacy of a challenged regulation, finding such review "well outside our compass." *Id.* at

[9] Chevron errs in asserting that *Keystone* addressed the appropriate standard of review for the "public use" requirement of the Just Compensation Clause. *Keystone* was not a public use case, and the remarks of both the majority and the dissent cited in the State's petition were clearly directed at the appropriate standard for evaluating a substantially advance claim. Chevron mistakenly suggests that the Court in *Keystone* addressed the substantially advance claim "separately"; the portion of the opinion it cites addresses diminution in value and investment-backed expectations. *See* 480 U.S. at 492-97. Chevron also errs in inferring heightened review from the "reasonable relationship" instructions given to the jury in *Del Monte Dunes*; the Court did not rule definitively upon the merits of those instructions, and gave no guidance as to what that general language implies regarding the appropriate standard of review.

839. Similarly, the California Supreme Court in *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999) plainly held that allegations that a law is ineffective in achieving its goals are out of bounds in a takings case, and gave broad deference to the legislature's judgment. *Id.* at 1000, 1003, 1006-07. These cases stand in direct conflict with the Ninth Circuit's instructions to the trial court to conduct a *de novo* inquiry into Act 257's effectiveness.

CONCLUSION

The petition for *certiorari* should be granted.

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AMICUS CURIAE

BRIEF

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BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AS *AMICUS CURIAE* SUPPORTING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae the League of California Cities submits this brief in support of the petition for a writ of certiorari.[1] This case involves a challenge based upon the Takings Clause of the Fifth Amendment to the right of democratically elected legislatures to establish economic policy. Seeking to preserve competition in the retail gasoline market, the State Legislature of Hawaii limited the rent oil companies may charge dealer/lessees to use oil company-owned service stations. The Ninth Circuit Court of Appeals found that federal courts have the power to strike down such statutes as "takings" where the court determines, based on its own weighing of evidence presented in court, that the regulation will not be effective.

Each of the member cities of the League is within the jurisdiction of the Ninth Circuit, and is therefore subject to that court's decision. Because the Ninth Circuit's transfer of power to formulate economic policy from legislatures to courts could have pervasive implications for local regulatory authority under the police power, this Court should consider the cities' viewpoint in this brief.[2]

INTRODUCTION

At issue in this case is which branch of government determines economic policy: democratically elected legislatures or courts. *Agins v. City of Tiburon*, 447 U.S. 255 (1980) has led to this controversy. In that case, the Court

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[1] The League of California Cities is an association of all 478 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing the 16 divisions of the League from all parts of the state. The Committee monitors appellate litigation affecting municipalities and identifies those cases that are of statewide significance.

[2] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief. Chevron has filed a blanket consent to the filing of *amicus* briefs.

held that courts are empowered to find that a regulation effects a "taking" of property under the Takings Clause of the Fifth Amendment if the regulation fails to "substantially advance legitimate state interests." *Id.* at 260.

Review of the Ninth Circuit opinion is warranted for two reasons. First, the substantially advance test allows courts to determine whether the regulatory means chosen by legislatures will be effective to achieve their ends. Until *Agins*, this Court had consistently held that the Due Process Clause provides the proper framework for judicial review of the wisdom and efficacy of government regulation. The Court limited regulatory takings to circumstances where regulation severely diminishes property value. The text of the Takings Clause, its original understanding, and takings jurisprudence provide no support for importing a means-ends test to the Takings Clause.

Second, assuming that a regulation can be deemed a "taking" merely because the regulation fails to advance a public purpose, lower courts disagree as to the level of judicial review the substantially advance standard requires. This case presents an opportunity for the Court to provide much needed guidance to the lower courts as to the scope of judicial review of economic regulation.

Since *Agins*, this Court and the lower federal and state courts have interpreted the substantially advance takings test to require either: (1) deferential judicial review – a test akin to rational basis; or (2) nondeferential review – known as "heightened scrutiny." The nondeferential standard of review arises from this Court's decisions in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In those cases, the Court held that the judiciary may subject exactions of physical interests in land imposed on individual permit applications to heightened scrutiny. However, as this Court recognized in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999): "[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use

decisions conditioning approval of development on the dedication of property to public use. . . . "

Nevertheless, in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001) ("*Chevron I*"), *on remand*, 198 F.Supp.2d 1182 (D. Ha. 2002), *aff'd sub nom, Chevron USA, Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004) ("*Chevron II*"), the Ninth Circuit went beyond administratively imposed, adjudicatory land exactions to apply nondeferential review to price control legislation. The Ninth Circuit opinions conflict with the interpretation given the substantially advance standard by other circuits and by the California courts. The Ninth Circuit opinions allow the courts to discard any notion of deference to the decisions of a legislative body as to the efficacy of economic regulation. Accordingly, the Ninth Circuit has vastly expanded judicial power to second-guess legislative policy decisions. Under *Chevron*, unelected and life-tenured judges would become super-legislatures, substituting their judgments as to wise and effective economic policy for those of elected and politically accountable representatives. This frontal assault on representative democracy runs contrary to basic principles of separation of powers and warrants review by this Court.

STATEMENT OF THE CASE

In 1997, Hawaii adopted Act 257 ("Act") to limit rents that oil companies may charge their retail gas station dealer/lessees for leasing company-owned stations to 15% of the dealer/lessee's gross profit from gasoline sales. App. 2.[3] The Act is designed to prevent oil companies from increasing rents to levels that would likely push independent dealers out of the already limited retail gasoline market.

Relying on *Agins*, *Nollan*, and *Yee v. City of Escondido*, 503 U.S. 519 (1992), Chevron challenged the Act as a regulatory taking on the ground, among others, that the

[3] Citations to the decisions of the lower courts are to the Appendix to the Petition for a Writ of Certiorari.

Act does not substantially advance legitimate state interests. App. 3, 63. Applying heightened scrutiny to the Act, the district court entered summary judgment for Chevron on its takings claim. App. 103-116.

In a two-to-one decision in *Chevron I*, the Ninth Circuit concluded that the district court correctly held that heightened scrutiny applied, allowing the court to inquire into the efficacy of the Act. App. 58-60. However, the majority found that whether the Act substantially advanced legitimate state interests raised triable issues of fact, and remanded the case to the district court for an evidentiary hearing as to whether the Act would actually accomplish its purpose. App. 79.[4]

On remand, the district court applied the substantially advance standard to determine whether the Act effected a taking. To predict the economic effects of the Act, the court heard testimony from economists representing each side of the issue. App. 40-46. The district court agreed with the theories advanced by Chevron's economist. The district court concluded that the Act effects a taking because it "does not substantially advance the State's legitimate interest in lowering gasoline prices." App. 53.

On appeal in *Chevron II*, the State argued that the substantially advance standard is not a legitimate test for a taking, and even if it were, that the district court, out of deference to the judgment of the Hawaii Legislature, should have applied a standard of review equivalent to the due process rational basis test. App. at 5. The same panel of the Ninth Circuit affirmed, again in a two-to-one decision. Relying on the law of the case, the majority rejected the State's arguments. App. 13-16. The court also addressed the State's arguments on the merits, finding that the court's application of heightened review in *Chevron I*

[4] As pointed out in the Petition for a Writ of Certiorari, the Ninth Circuit mistakenly assumed that the purpose of the Act was to *decrease* gasoline prices, rather than to maintain robust competition, prevent monopolization, and ultimately avoid price *increases*. See Petition at 2.

was not clearly erroneous. App. 14-16. In his dissenting opinion, Judge Fletcher objected to the court's application of heightened scrutiny: "Rent control is often inefficient and sometimes unfair. But we should not confuse inefficiency and unfairness with unconstitutionality." App. at 29.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. REVIEW BY THIS COURT IS NECESSARY TO ESTABLISH A CLEAR STANDARD OF JUDICIAL REVIEW FOR ECONOMIC REGULATION.

A. This Court's Decisions Have Created Confusion Regarding the Legitimacy and Scope of the Substantially Advance Test.

The legitimacy of the substantially advance test as a test for a regulatory taking is open to serious debate. The degree of judicial deference to legislative enactments has fluctuated over time. Between 1897 and 1936, the Supreme Court embraced a *laissez faire* economic philosophy. In its most extreme application of *laissez faire*, *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a state law designed to safeguard the health of bakers by limiting their working hours. In *Lochner*, the Court freely exercised its own judgment as to the appropriate policy for the health of bakers. *See id.* at 56-57. But Justice Oliver Wendell Holmes' dissent in *Lochner* laid the foundation for the eventual repudiation of *Lochner's* free-market philosophy: "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*. . . . " *Id.* at 75.

Beginning in 1934 and continuing for more than 50 years, the Court abandoned the intrusive *Lochner*

standard.[5] In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court thoroughly embraced the deferential standard of review of economic legislation:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis. . . . *Id.* at 152.

Since the demise of *Lochnerian* substantive due process, this Court has generally reviewed economic regulation under the Due Process Clause by applying the deferential rational basis test.[6] Under that test, the court must uphold the regulation unless no reason can be conceived to support it. *Carolene Products*, 304 U.S. at 152. The burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *Id.* Indeed, in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), this Court upheld a Maryland statute strikingly similar to Act 257 against a due process challenge. The Maryland law sought to foster competition among retail gas suppliers by prohibiting oil companies from owning retail gas stations. The Court emphatically rejected the notion that the courts have a role in forging this type of economic policy:

[5] *See, e.g., Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose"); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours.").

[6] *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 11, 14 (1988) (proper standard of judicial review of legislative rent control is deferential); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If validity of legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control").

> Responding to evidence that producers and refiners were favoring company-operated stations in the allocation of gasoline and that this would eventually decrease the competitiveness of the retail market, the State enacted a law prohibiting producers and refiners from operating their own stations. Appellants argue that this response is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But . . . this argument rests simply on an evaluation of the economic wisdom of the statute, and cannot override the State's authority "to legislate against what are found to be injurious practices in their internal commercial and business affairs . . . . " *Id.* at 124 (citations omitted).

In *Agins*, however, this Court set the stage for a potentially different standard of judicial review of economic regulation. In that case, the Court reintroduced a means-ends test for land use regulation, but under the Takings Clause. The Court held that the application of a zoning law to property effects a taking if the law "does not substantially advance legitimate state interests." 447 U.S. at 260.[7]

The substantially advance test conflicts with the plain language of the Takings Clause, which requires the payment of compensation for taking of private property for public use. It is difficult to discern how the failure of a regulation to fulfill a valid public purpose could "take" property. Before *Agins*, the Takings Clause had never been understood as a substantive limit on governmental power.

[7] While *Agins* and the vast majority of regulatory takings cases concern land, the Takings Clause has been applied to other types of property. *See, e.g., Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998) (plurality applying Takings Clause to statute imposing obligation to pay money). The substantially advance test potentially applies to every type of economic activity involving private personal or real property.

As one commentator observed, the Framers of the Constitution did not intend the Takings Clause

> to impose a substantive limit on congressional expropriations. Rather, they intended to distinguish a certain type of taking which required compensation (expropriations) from those which did not (taxes and forfeitures). In essence, the drafters merely intended to ensure that compensation was given when a citizen was called upon to contribute more than his fair share to support the government. . . . [I]f read properly, the expropriation clause of the Fifth Amendment is nothing more than a compensation clause. Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1248-49 (2002)

See also Eastern Enterprises, 524 U.S. at 545 (Kennedy, J., concurring and dissenting) ("the Takings Clause . . . has not been understood to be a substantive or absolute limit on the Government's power to act"); *id.* at 554 (Breyer, J., dissenting) ("[A]t the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good.").

Moreover, the substantially advance test lacks any basis in takings jurisprudence. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978), the Court first referred to a means-ends test under the Taking Clause in reliance on two due process cases, *Nectow v. Cambridge*, 277 U.S. 183 (1928) and *Moore v. East Cleveland*, 431 U.S. 494 (1977). Two years later, in *Agins*, the Court formalized this means-ends test for a taking, once again relying on *Nectow*. *Agins*, 447 U.S. at 260. No takings decision of this Court supports grafting a means-ends test to the Takings Clause. To the contrary, the substantially advance test directly conflicts with other decisions of this Court. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) the Court unanimously held that takings analysis is not concerned with

the effectiveness of legislation. *Id.* at 487 n.16; *id.* at 511 n.3 (Rehnquist, J., dissenting). And in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), the Court concluded that courts should defer to the legislative determination of public purpose in direct condemnation actions. *Id.* at 242. There is no principled reason to depart from that rule in inverse condemnation.

Despite the questionable origins of the *Agins* substantially advance test, this Court has not entirely repudiated the test, and the lower courts have been compelled to apply the test, simultaneously entreating this Court to end the confusion as to the test's validity and meaning. *See, e.g., Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1013 (Cal. 1999), *cert. denied*, 526 U.S. 1131 (Kennard, J., concurring) ("Outside the *Nollan/Dolan* context, should a means-end test be used to determine whether a taking has occurred, or instead should means-end testing remain within due process jurisprudence? Only the high court can resolve this question and, given the importance of this area of the law, I suggest that it do so when the opportunity next arises.") *Chevron* provides an ideal vehicle for the Court to reject the test, end the confusion as to the role of the courts in economic policy-making, and restore the means-ends inquiry to its proper place under the Due Process Clause.

Even if the Court does not repudiate the substantially advance test, it should grant review to settle the meaning of the test. Since the Court decided *Agins*, different standards of judicial review have evolved under the substantially advance test. Nondeferential review of the type employed here by the Ninth Circuit, known as "heightened scrutiny," applies to "exactions" imposed on a case-by-case basis – where the government conditions approval on an owner's dedication of land to the public to offset the impact of a proposed project. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385. Heightened scrutiny imposes the burden on the government to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. Heightened scrutiny

arises from the Court's concern that, in cases of unique, discretionary, adjudicatory exactions imposed on individual applications, the danger exists that the public agency might improperly leverage its police power by requiring an individual property owner to bear more than its share of responsibility for the burdens caused by development. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385.

The Court has also found that heightened scrutiny is appropriate for administratively imposed exactions of real property interests because such regulations resemble physical takings. *See Nollan*, 483 U.S. at 831; *see also Dolan*, 512 U.S. at 385.

In contrast, this Court has indicated that a deferential standard continues to apply to legislative land use regulations that are generally applicable because the risk of the use of the police power to exact unconstitutional conditions is not present. *Nollan*, 483 U.S. at 834-35; *see also Dolan*, 512 U.S. at 385 (courts do not apply heightened scrutiny to regulations that "involve[] essentially legislative determinations classifying entire areas of the city"). The implicit justification for this distinction is that classes of property owners have greater power to influence land use policy in the legislative process and thus require less protection from government overreaching than do individual property owners engaged in administrative, adjudicatory decision-making proceedings. *See id.*

Consistent with *Nollan* and *Dolan*, five justices in *Eastern Enterprises* held that courts should apply deferential review to the substance of generally applicable legislation. Significantly, a majority of the justices rejected the notion that the "substantially advance" prong of *Agins* enunciated a freestanding takings test outside the *Nollan/Dolan* context of administratively compelled dedications of land. Five justices indicated that the deferential substantive due process test, rather than a takings analysis, should be applied to a law requiring the payment of money. 524 U.S. at 545-46 (Kennedy, J., concurring and dissenting), 554-58 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). As Justice Kennedy

stated, the wisdom of governmental action that does not require the dedication of possessory interests in real property is more appropriately analyzed under "general due process principles rather than under the Takings Clause." *Id.* at 545 (Kennedy, J., concurring and dissenting).[8]

In *Del Monte Dunes*, this Court observed that it had thus far applied heightened scrutiny only in "the special context of exactions." 526 U.S. at 702. The Court held that heightened scrutiny was not intended to apply to denials of individual development applications. *Id.* at 702-03; *see also id.* at 723 (Scalia, J., concurring); *id.* at 733 (Souter, J., dissenting, joined by O'Connor, Ginsburg, and Breyer, JJ.). The Court allowed the jury to determine whether the City of Monterey's conduct "substantially advances legitimate public interests" under the Takings Clause only because the city did not object to a jury instruction allowing that question to be put to the jury. *Id.* at 721-22.

Although this Court has signaled that the substantially advance test does not raise the standard of judicial review for economic legislation generally, it has not definitively resolved the issue, engendering considerable confusion in the lower courts. The Court should grant review in this case to settle this issue.

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[8] Other circuit courts have treated as binding this Court's five-four holding in *Eastern Enterprises* that the Takings Clause is not a substantive limit on the state's police power. In *Commonwealth Edison Company v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002), the court observed: ["F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority." *Id.* at 1339-40; *see also Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658-59 (3d Cir. 1999), *cert. denied*, 528 U.S. 963 (lower courts "are bound to follow the five-four vote (in *Eastern Enterprises*) against the takings claim. . . . "); *Kitt v. United States*, 277 F.3d 1330, 1336-37, *mod. on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) (same).

B. Circuit Court Decisions Conflict as to the Legitimacy and Scope of the Substantially Advance Test.

Conflict among the decisions of the circuit courts is also grounds for granting certiorari. Supreme Court Rule 10. Despite this Court's clear indication that legislative regulations should not receive heightened scrutiny, the circuit courts and the state courts have issued decisions that conflict with *Chevron* as to both the legitimacy and meaning of the substantially advance test. *Compare Simi Investment Co. v. Harris County*, 256 F.3d 323, 323 & n.3 (5th Cir. 1998) (*on pet. for rhrg. en banc*), *cert. denied*, 534 U.S. 1022 (2001) (whether ordinance is "illegitimate or arbitrary" is inquiry under Due Process Clause, not Takings Clause); *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997) (heightened scrutiny not applicable to zoning regulation that does not compel a physical invasion); *Texas Manufactured Hous. Ass'n v. Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996), *cert. denied*, 521 U.S. 1112 (1997) (rejecting application of *Nollan* to legislation regulating location of manufactured homes); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny inapplicable to hunting license scheme because regulation not a "physical taking or its equivalent"); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343 & n.1 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002) ("The Takings Clause 'is designed not to limit the governmental interference with property rights per se but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'"); *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 974-75 (1999), *cert. denied*, 529 U.S. 1094 (2000) (heightened scrutiny does not apply to downzoning); *Santa Monica Beach*, 968 P.2d at 1001-02 (Cal. 1999) (deferential standard applies to regulations that are "generally applicable through legislative action"), *with Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998) (applying heightened scrutiny to legislative rent control); *Chevron I*, 224 F.3d 1030 (same); *Chevron II*, 363 F.3d 846 (same); *Northern Illinois Home Builders Ass'n v. County of DuPage*, 649 N.E.2d 384, 389 (Ill. 1995) (heightened scrutiny applicable to legislative development impact fee); *Trimen Development Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994) (same); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (applying heightened scrutiny to rent control legislation).

Chevron even contradicts prior authority from the Ninth Circuit. *See Schnuck v. City of Santa Monica*, 935 F.2d 171, 175 & n.5 (9th Cir. 1991) (evidence that "many economists believe that imposition of rent ceilings for other than short emergency periods tends to reduce housing quality and quantity . . . calls into question the wisdom of the Rent Control Law, but not its constitutionality"); *Commercial Builders v. City of Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) (*Nollan* does not change deferential standard of review of legislative land use regulations "that do not constitute a physical encroachment on land."); *Garneau v. City of Seattle*, 147 F.3d 802, 817-18 (9th Cir. 1998) (Williams, J., concurring) (substantially advance claim properly reviewed under substantive due process, not takings); *Hotel & Motel Ass'n v. City of Oakland*, 344 F.3d 959, 968 (9th Cir. 2003) (ordinance substantially advanced legitimate state interest where reasonable relationship existed between regulation and public purpose); *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088, 1097-98 (9th Cir. 2004) (deferential review applies to development impact fee challenged under substantially advance test). And an *en banc* panel of the Ninth Circuit recently adopted the majority view in *Eastern Enterprise* that substantive review of legislative regulations is not appropriate under the Takings Clause:

> The Takings Clause was never intended to replace the role of the people in determining which social programs are appropriate, and "has not been understood to be a substantive or absolute limit on the government's power to act. That Clause operates as a conditional limitation, permitting the government to do what it wants so

long as it pays the charge." *Eastern Enters.*, 524 U.S. at 545 (Kennedy, J., concurring in judgment and dissenting in part). *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 856 (9th Cir. 2001) (*en banc*), *cert. granted*, 536 U.S. 903 (2002).[9]

In 1992, in *Yee v. City of Escondido*, 503 U.S. 519, this Court foreshadowed the controversy surrounding the substantially advance test. In *Yee*, the Court declined to consider a substantially advance challenge to a mobile home rent control ordinance in part because "[t]he lower courts have not reached conflicting results . . . on whether similar mobile home rent control ordinances effect regulatory takings." *Id.* at 537-38. Since *Yee*, however, the lower federal and state courts have reached conflicting results on the level of judicial review of mobile home and other rent control. *Compare Cashman v. City of Cotati*, 374 F.3d 887, 897 (9th Cir. 2004) (applying heightened scrutiny to find mobile home rent control fails substantially advance test); *Chevron II* (applying heightened scrutiny to rent control); *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1166 (9th Cir. 1997) (same), *with Ventura v. City of San Buenaventura*, 371 F.3d 1046, 1055 (9th Cir. 2004) (rejecting constitutional challenge to mobile home rent control because ordinance "is at least rationally related to legitimate state interests"); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993) (rejecting constitutional challenge to mobile home rent control because "[h]ow well the ordinance serves [its] purpose[s] is a legislative question"); *Montclair Parkowners Assoc. v. City of Montclair*, 90 Cal.Rptr.2d 598, 605 (Cal.App. 1999) (expressly rejecting holding in *Richardson*, finding that mobile home rent control satisfies substantially advance test); *Sandpiper Mobile Village v. City of Carpinteria*, 12 Cal.Rptr.2d 623, 628-29 (Cal.App. 1992), *cert. denied*, 507

[9] The Supreme Court did not grant certiorari on the substantially advance issue.

U.S. 1032 (1993) (mobile home rent control satisfies substantially advance test). Mobile home rent control is merely one of many types of economic regulation that has been thrown into chaos as a result of the uncertainty surrounding the substantially advance test.

This Court has not definitively resolved either the legitimacy or the scope of the substantially advance takings test, particularly as it applies to generally applicable economic regulation. It is imperative that the Court grant review in this case to establish a uniform standard of judicial review of economic regulation.

II. THIS COURT SHOULD PRESERVE THE AUTHORITY OF ELECTED LEGISLATURES TO DECIDE THE WISDOM AND EFFICACY OF ECONOMIC REGULATION.

A reversal of *Chevron* is critically important for *amici* cities. The cities – like the state and federal government – have enacted scores of laws regulating economic activity to promote the general health, safety, and welfare and continue to enact such regulations daily. *Chevron* invites legal challenges to every one of these regulations as a "taking."

Chevron allows aggrieved property owners, and indeed, businesses of all kinds, to avoid the political process entirely. If the decision stands, courts could be permitted to assume the role of legislatures, and the public would be denied a voice in matters that have direct and immediate impact on their health, safety, property values, economic welfare, and quality of life. The framers of the Constitution could not possibly have intended this result. This Court should therefore overrule *Chevron* and establish a standard of review of economic regulation that preserves traditional deference to the policy decisions of legislative bodies, whether federal, state or local.

A. *Chevron* Conflicts with Representative Democracy.

The Constitution embodies the doctrine of separation of powers between the legislative and judicial branches. The separation of powers protects decisions of the legislature from "lateral attack by another branch." *Gorieb v. Fox*, 274 U.S. 603, 608 (1926). The legislative and executive branches hold authority to make social and economic policy. As the Supreme Court has consistently recognized in cases involving the powers of the other branches, the Constitution limits the role of the judiciary to restraining the *arbitrary* exercise of legislative authority. *E.g.*, *Dolan*, 512 U.S. at 391 n.8.

To work effectively, a democratic system must allow citizens equal opportunity to control the decision making agenda. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 112-13 (1989). Each citizen must also possess the right to express preferences for a decision, meaning that each citizen's vote should receive equal weight. *Id.* at 109. Majority rule promotes this self-determination. "[T]he strong principle of majority rule ensures that the greatest possible number of citizens will live under laws they have chosen for themselves." *Id.* at 138.

One of the primary roles of the judiciary is to rein in the excesses of the other branches of government. The judiciary ensures that legislative enactments are within the Constitution. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 153 (2001). The role of the courts in reviewing legislation to protect fundamental liberties is well established. *Id.* When courts venture outside this realm into policy making that does not implicate fundamental rights, however, the courts frustrate democratic ideals. *Id.* at 153-54. Allowing judges to review legislative policy under a test as standardless as the means-ends takings analysis applied in the instant case creates the risk that their personal philosophical beliefs will color their decisions. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 272-76, 473-74 (1995) (highlighting risks of judicial activism).

Once accepted, judicial review of legislation under the substantially advance test has no principled stopping point. And placing power in the hands of an unelected, life-tenured judiciary to declare that regulations are takings on the grounds that they will not achieve their avowed purpose conflicts sharply with self-governance. In recognition of these hallmark principles of our democratic system of government, this Court has sharply limited the authority of judges to interfere with legislative control of economic activity, by confining searching judicial review to regulations that affect fundamental rights. *See, e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

Act 257 does not implicate fundamental rights. Accordingly, the determination that the regulation will achieve some legitimate state interest should be subject to the sound discretion of the legislature. Whether a price control such as that at issue here will have its intended effect in a complex industry may be debated in lengthy legislative committee hearings, in which economists, consumer advocates, industry participants, and even individual legislators present divergent views on the question. Along with that gathering of evidence, legislators weigh the opinions of constituents affected by the proposed regulation, and then fashion a policy intended to promote the general health, safety, and welfare.

Predicting the impact of price controls in a complex business such as the motor fuel industry is quintessentially a legislative policy function. The courts have no greater right to legislate this policy than they have to dictate zoning decisions, safety requirements for autos, or the proper procedure for pasteurizing milk. In this case, by extending no deference to the State Legislature of Hawaii on a question of economics, the district court assumed a legislative role. Had the district court based its decision on past effects on retail gasoline prices, the court would nonetheless have usurped the legislature's policy making function. But here, the district court engaged in a particularly egregious violation of the separation of powers by sustaining a *facial* challenge to the Act. The trial court *predicted* that the Act *would have* particular effects. The

expert testimony predicting the effects of the Act was not "evidence," however, nor were the district court's rulings findings of "fact" or conclusions of "law." *See* App. at 32, 50. The expert testimony on which the district court here relied was little more than speculation as to the effects of the Act. The court simply embraced one economic theory over another. *See* App. 43. In any event, the process of determining economic policy by predicting the economic effects of proposed regulation is fundamentally a legislative function. It is not a function the courts are well-equipped to perform and it is outside of their proper adjudicative role.

Chevron raises the potential for abuse of judicial power with regard to all government regulation, not merely price controls. If *Chevron* were allowed to stand, then the deferential rational basis test, historically applicable to economic legislation, would be eviscerated. The court's proposal in *Chevron* that the federal courts should conduct their own evidentiary hearings to predict the effects of legislation takes a page directly from *Lochner*.[10]

B. *Chevron* Will Promote Inefficiency and Chaos in Economic Policymaking.

If courts were the final arbiters of economic policy, the legislative enactment of an economic policy would mark only the beginning of the decision making process. The validity of any policy would remain unsettled for years as challenges to the legislation wound their way through the courts. Removing certainty as to the validity of economic

[10] The *Chevron I* majority noted that its decision should be narrowly applied and that it "save[s] for another day the question of whether the 'substantially advances' test applies outside the context of rent control statutes that permit the capture of a premium." 224 F.3d at 1036 n.4. But the court's reasoning that legislatures cannot be entrusted to make policy with respect to the economic relations between commercial landlords and tenants could be easily expanded to apply to all regulation that affects the value of assets.

regulation would chill business and real estate investment.

Moreover, the nondeferential standard of judicial review would flood the courts with lawsuits by business and property owners, as virtually any economic regulation would be subject to challenge as a taking. The government could be compelled to defend thousands of laws in evidentiary proceedings, at colossal cost to the taxpayers.

Nor do the courts have the institutional competence to study and mediate between competing interests in any industry – a function that is the essence of law making. A court confronted with a complex issue of economic regulation is no substitute for a local legislative agency that can see the larger picture in its jurisdiction or region. Economic regulations are often interdependent. Effective economic regulation requires a broader perspective than one isolated case at one point in time. Decisions as to the most effective economic policies are best made by legislatures taking the initiative to identify problems, receiving evidence from a wide range of affected parties and interest groups, debating the advantages and disadvantages of alternative policies, and compromising in order to reach a majority decision. A court with hundreds of cases on its docket is not the proper forum to make economic policy.

C. *Chevron* Will Encourage Forum Shopping and Multiply Litigation in the Federal Courts.

In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-95 (1985), this Court held that a takings claimant must seek compensation in state court under state procedures before a federal takings claim arises. Contradicting *Williamson County*, however, the Ninth Circuit has held that a facial challenge to regulation on the ground that it does not substantially advance legitimate state interests is ripe in federal court even though the claimant has not sought compensation in state court. *Sinclair Oil Corp. v. County of Santa Barbara*,

96 F.3d 401, 407 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998).

Although it is settled law in California that deferential judicial review applies to economic legislation challenged under the Takings Clause, *see San Remo Hotel*, 41 P.3d 87, 101-03 (Cal. 2002); *Santa Monica Beach*, 968 P.2d at 1001-02, *Chevron* applies nondeferential review. While most takings claims must be litigated in state court, *Chevron's* more favorable treatment of facial substantially advance claims will generate considerably more substantially advance takings challenges to legislation and induce many takings claimants to elect the federal forum, in defiance of *Williamson County*. The result would be confusion and inconsistent adjudications as between the federal and state courts. *Amici* cities would find it difficult to discharge their governmental functions under such uncertainty as to the standard of judicial review of their enactments. Moreover, the more generous federal forum for takings claims would inundate the federal courts with challenges to every manner of local economic regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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